

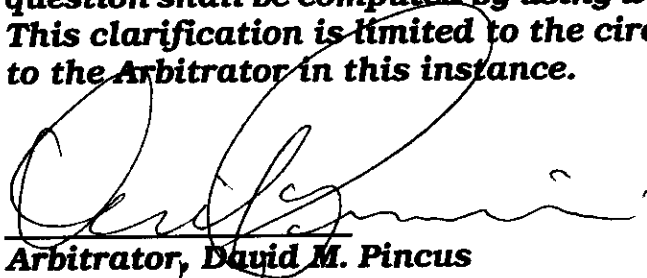
**ARBITRATOR, DAVID M. PINCUS**

**AWARD CLARIFICATION**

**March 18, 1992**

**1. Charles Smith - No. 35-16-910301-0064-01-03**

**In terms of clarifying the abovementioned Award, the Suspension in question shall be computed by using work days rather than calendar days. This clarification is limited to the circumstances presented by the Parties to the Arbitrator in this instance.**

A large, stylized handwritten signature in black ink, appearing to read 'David M. Pincus', is written over a horizontal line.

**Arbitrator, David M. Pincus**

**3/18/92**  
Date

STATE OF OHIO AND OHIO CIVIL  
SERVICE EMPLOYEES ASSOCIATION  
LABOR ARBITRATION PROCEEDING

#681

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF  
YOUTH SERVICES, TRAINING CENTER  
FOR YOUTH

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,  
LOCAL 11, AFSCME, AFL-CIO

GRIEVANCE: Charles F. Smith (Discharge)

OCB Case No.: 35-16-(91-01-17)-0064-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: October 30, 1991

APPEARANCES

For the Employer

Bob Wagner  
Paul A. West  
Scott Mullarkey  
Paul Kirschner  
Bradley Rah~~l~~

Superintendent  
Youth Leader II  
Unit Manager  
Second Chair  
Advocate and Labor  
Relations Officer

For the Union

Charles F. Smith  
Jacinta Hooker  
Patrick A. Mayer

Grievant  
Observer  
Advocate and Staff Representative

### INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Youth Services, Training Center for Youth, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1989 through December 31, 1991. (Joint Exhibit 1).

The arbitration hearing was held on September 27, 1991 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

### STIPULATED ISSUE

Was the Grievant discharged for just cause? If not, what shall the remedy be?

## PERTINENT CONTRACT PROVISIONS

### ARTICLE 24 - DISCIPLINE

#### Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

#### Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

...

(Joint Exhibit 1, Pgs. 37-38)

#### Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is

assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

...

(Joint Exhibit 1, Pg. 39)

#### STIPULATED FACTS

- 1) THE GRIEVANT WAS A YOUTH LEADER II AT THE TRAINING CENTER FOR YOUTH
- 2) HE WAS WORKING GROUP ATTUCKS ON DECEMBER 9, 1990
- 3) THE GRIEVANT HAD SERVICE WITH DYS 1985-1991 and 1957-1963
- 4) THE GRIEVANT WAS AWARE AND TRAINED ON DYS DIRECTIVE B-19, GENERAL
- 5) THE GRIEVANT HAS NO PRIOR DISCIPLINE IN HIS PERSONNEL FILE
- 6) THE GRIEVANT WAS TERMINATED ON JANUARY 11, 1991
- 7) THE GRIEVANT DID BRING A Co2 CARTRIDGE BB GUN INTO THE TRAINING CENTER FOR YOUTH

#### CASE HISTORY

Charles F. Smith, the Grievant, was employed as a Youth Leader II

at the time of the disputed incident. His work history indicates two separate employment periods with the Department of Youth Services, the Employer. The initial relationship took place during the period 1957-1963, while the most recent stint took place during the period 1985-1991.

The circumstances which engendered the Grievant's removal took place at the Training Center For Youth, Columbus, Ohio. This medium security facility houses approximately 150 special needs youth ranging from twelve to twenty-one years of age. This correctional facility has a general mission which involves the re-integration of juvenile offenders back into the community. A mission of this sort is sometimes difficult in light of the divergent resident population. All of the residents are confined for felony related offenses; some of which are tainted with psychiatric, homicidal, arson or sex difficulties.

For the most part, the circumstances surrounding the present matter are not in dispute. The Grievant testified he took part in a social gathering with his girl friend on December 9, 1990. At some point during the dinner party, his girl friend informed him a BB gun he had purchased for her son needed repair or replacement. The Grievant advised her that he would take it back to the store on his next visit to Cleveland. His girl friend placed the BB gun in his "work" bag prior to his departure.

The Grievant worked the 11:00 P.M. to 7:00 A.M. shift the evening of December 9, 1990. He admitted that he completely forgot the BB gun was in his "work" bag when he arrived at approximately 10:15 A.M. As a

Senior Floater, he selected Group Attucks as his assignment for the day.

On December 10, 1990, at approximately 7:30 A.M., Paul West, Youth Leader II, and the person that relieved the Grievant, was contacted by Jerry H. a youth housed in Group Boone, about an incident. West advised Jerry H. to come back at 8:00 A.M. Jerry H. did return and advised West that there was a BB gun hidden on Group Boone in the plumbing access panel beside the drinking fountain. Jerry H. also informed West that another youth, Jason B., had taken the BB gun out of the Grievant's bag located in his office.

West developed a plan to remove the gun without the presence of any youths. He successfully removed the BB gun and proceeded to the duty office. At approximately 8:00 A.M. he met with Duty Officer Roberts and Scott H. Mullarkey, the Unit Manager. Mullarkey delivered the BB gun to Robert F. Wagner, Superintendent, and also gave him a brief review of the situation.

Mullarkey conducted a subsequent investigation which, for the most part, corroborated Jerry H.'s preliminary account. After interviewing all of the relevant participants, Mullarkey reported the following findings. At approximately 7:25 A.M., on December 10, 1990, Jason B. walked over to Group Attucks while the Youth Leader on Group B was locking the dormitory rooms and engaged in other detail related activities. Purportedly, Group Attuck's door was open, as well as the Grievant's office door. Jason B. entered the office and searched the Grievant's bag where he found the BB gun. He removed the BB gun and returned to Group Boone where he showed it to several youths and

eventually stowed it in a plumbing access panel.

The Grievant testified he received a phone call from a co-worker the afternoon of the incident. This individual purportedly told the Grievant about discussions taking place at the facility concerning his BB gun. The Grievant emphasized he had no knowledge that the BB gun was missing from his bag prior to this conversation. He, then, contacted Duty Officer Roberts and asked to speak to Youth Leader West. Roberts denied this request but informed the Grievant about the particulars surrounding the incident. The Grievant remarked that "the gun wasn't working."

On December 11, 1990, the Grievant was formally advised of a forthcoming Pre-Disciplinary meeting to be held on December 20, 1990. He was charged with the following allegations and related work rule violations:

"...

It is alleged that during your tour of duty December 9, 1990, you left your Group Attucks unlocked and that a youth from another unit entered the unit, entered the office, and entered a bag of personal belongings of yours. He removed a gun, believed to be a BB gun. The gun contained BB's.

Such actions constitute a violation of DYS Directives, Chapter B-19, Section IV-A, Work Rule #46 which states, "...failure of good behavior, or any other acts of misfeasance or nonfeasance in office.", and Work Rule #40 which states, "Bringing into the institution, using or distributing contraband items, including, but not limited to items prohibited by DYS or institutional Directives.", and Work Rule #41 which states, "possessing a weapon or a reasonable facsimile thereof while on state property...", and Work Rule #1-B which states, "Failure to perform the duties of the position which the employee holds."

..."

(Joint Exhibit 5, Pg. 1)



The Grievant was also informed that the discipline considered ranged from a possible suspension up to and including removal.

The Pre-Disciplinary meeting was, in fact, held on December 20, 1990. Evelyn Turner, the Chairperson, supported discipline because the Grievant admitted having the BB gun in his possession and it was taken from his office.

Geno Natalucci-Persichetti, Director, formally notified the Grievant of his removal on January 11, 1991. He was charged with violating DYS Directives, Chapter B-19, Section IV-A-40, 41 and 46 (Joint Exhibit 3, Pg. 2).

On January 11, 1991 a grievance was filed on behalf of the Grievant. It contained the following statement of facts:

"...

Employee was removed from position as a Youth Leader. Thier (sic) was no just cause to remove employee.

..."

(Joint Exhibit 3, Pg. 1)

A Step III hearing was held on February 5, 1991. The Hearing Officer upheld the removal. He concluded that the Grievant's actions warranted removal. His actions, moreover, were further tainted by his own negligence which enabled the youth to possess the weapon.

The Parties were unable to settle the dispute. Since neither Party raised procedural nor substantive arbitrability objections, the grievance is properly before this Arbitrator.

## MERITS OF THE CASE

### The Position of the Employer

In the opinion of the Employer, it had just cause to remove the Grievant. The fact situation strongly supports the removal decision. The Grievant admitted he brought a dangerous weapon into the institution. This negligent act was in direct violation of three work rules contained in Chapter B-19 - General Work Rules (Joint Exhibit 2):

#### Rule 40. Contraband

Bringing into the institution, using or distributing contraband items, including, but not limited to, items prohibited by DYS or institutional Directives.

#### Rule 41. Possession of a Weapon

Possessing a weapon or reasonable facsimile thereof while on State property, in a State vehicle, or conducting State business.

#### Rule 46. Violation of O.R.C. 124.34

Includes, but is not limited to such offenses as incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of Administrative Services or the commission of any other failure of good behavior, or any other acts of misfeasance, or nonfeasance in office.

Various mitigating circumstances raised by the Union were refuted by the Employer. Whether one could characterize the Grievant's actions as intentional or inadvertent was viewed as an irrelevant distinction. As soon as he entered the grounds with the weapon he violated the above-mentioned work rules. The Employer emphasized that it could not minimize the violations; to do so would contradict the institution's

primary mission. This mission involves the confinement of high risk juvenile offenders in a secure environment. His actions allowed a dangerous felony offender to come into the possession of a weapon. In this particular instance, the timely intervention of another youth offender, prevented a possible negative outcome. Yet, the staff, community and other confinees were placed in harms way while the gun was in the possession of Jason B. A dangerous situation of this sort cannot be condoned.

Just because the weapon in question was a BB gun, rather than another weapon, does not minimize the seriousness of the Grievant's actions. The Employer emphasized the gun in question could easily pass as a more lethal weapon; it did not appear to be a toy. It could have been used to compromise the existing security arrangements. The weapon, itself, is CO2 powered and is marked with a warning which states "misuse or careless misuse may cause serious injury or death." The fact the BB gun was broken did not minimize the potential use of the weapon as a decoy for escape purposes.

In its closing argument, the Employer declared that the Grievant was not removed for leaving his office and Group Attuck's door unlocked. The advocate stated "He was not removed from his position for leaving the group doors open. He was removed for bringing in a gun to the institution." As such, whether the Grievant or other personnel with access negligently left the doors open was viewed as irrelevant.

It was argued that the decision to remove the Grievant was well-within the guidelines specified in Section 24.02. The various

considerations previously articulated clearly indicate that the Employer followed the principles of progressive discipline and the discipline was commensurate with the offense.

#### The Position of the Union

In the opinion of the Union, the Employer did not have just cause to remove the Grievant. The Union raised the following considerations in support of its position: the application of the work rules to this particular situation; the credibility and cooperation of the Grievant; and various factors which evidence a need to modify the administered discipline.

The Union asserted the Employer unreasonably applied the work rules in question. The Grievant did not intentionally convey the BB gun into the institution, nor did he intentionally possess the weapon while on State property. The BB gun was placed into the Grievant's bag by another individual, his girl friend, after a social engagement. He merely forgot about the gun, and only remembered the oversight after being informed by a co-worker. A signed statement (Union Exhibit 1) authored by the girl friend supported the Grievant's version of the events. The BB gun's unworkable state was also referenced in support of the misapplication premise. Within this context, equity considerations require the Arbitrator to distinguish the present situation from one involving actions which evidence malicious intent.

The Grievant's testimony was not self-serving but highly credible and persuasive. He told the truth at the hearing and throughout the entire disciplinary process. The Grievant's testimony never waived

but remained consistent. He admitted he carried the BB gun onto the institution's grounds, and admitted his mistake. He, moreover, cooperated throughout the investigation of the incident and provided a written statement.

The Employer never proved the Grievant negligently left his office and Group Attucks' doors unlocked. Other individuals could have unlocked these doors which provided the youth offender with access to the Grievant's personal bag. It was established that the staff had duplicate keys to the doors involved in the incident. Also, staff frequently accessed their various assignments by utilizing Group Attucks' doors. The record clearly indicated the Employer failed to investigate whether any other staff member had access to the office on the day in question. Jason B.'s Statistical Reporting and Face Sheet (Employer Exhibit 1) indicated a history of criminal offenses against property, and specifically, breaking and entering. As such, there was a strong likelihood that the doors were "jimmied." And yet, the Employer admitted that no one evaluated the condition of the doors during the course of the investigation.

The Union posited that a lesser penalty would have been more commensurate with the offense. The Employer's disciplinary grid (Joint Exhibit 2) specifies lesser penalties for identical infractions. The Grievant's length of service and untarnished disciplinary record were also viewed as valid mitigating factors.

The Whiteside<sup>1</sup> case relied on by the Employer in support of its position was distinguished by the Union. The facts were viewed as somewhat different. A fully functional weapon with bullets was uncovered when a briefcase, normally carried by the grievant, was searched in an entrance to the facility. Also, the grievant's version of events was not supported by the record, and thus, he lacked credibility.

THE ARBITRATOR'S OPINION AND  
AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record and pertinent terms and conditions of employment, it is my judgment that the Employer had just cause to discipline the Grievant. This Arbitrator, however, rules the penalty assessed is too severe in light of circumstances surrounding the dispute. As such, I am forced to modify the discipline; discharge was not the appropriate penalty.

It is axiomatic, if an employer's decision in the matter is not arbitrary, capricious or unreasonable, or based upon a mistake of fact, the decision should typically stand. Also, if the penalty imposed is within a range of reasonableness, it should not be disturbed. Here, based upon the particular facts and circumstances of this case,

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<sup>1</sup>The State of Ohio, Department of Mental Health and Ohio Civil Service Employees Association, AFSCME, Local 11, Case No. 23-06-880520-0027-01-03 (Klein, 1989)

reasonable rules have been unreasonably interpreted or applied; the rules were enforced with absolute rigidity regardless of the situation involved.<sup>1</sup>

The proposition previously described is encouraged by terms and conditions negotiated by the Parties. Section 24.02 specifies that disciplinary action shall be commensurate with the offense and the Employer will follow the principles of progressive discipline. Also, Section 24.01 limits an arbitrator's authority to modify the termination of an employee committing patient abuse. The Parties have not placed similar restraints in other discipline offense domains.

When unreasonable application of reasonable rules is an issue, one needs to question whether the particular purpose of the rule is reasonably fulfilled in the particular context in which an employer seeks to apply it. I am highly sensitized to the youth population in question, the facility's mission and the possible security risks associated with bringing contraband into the institution and possessing a weapon while on State property. And yet, I would be failing in my role as the Parties' trier of fact if I totally disregarded the Grievant's intent with respect to the offense in question. Although the Grievant should not be totally absolved from his actions, discharge is an unwarranted outcome.

The following factors were considered in evaluating the Grievant's intent. The Grievant did not place the BB gun into his bag filled with

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<sup>1</sup>Aro, Inc., 24-2 ARB Par. 8500 (King, 1964); Pennsylvania Greyhound Bus Co., 18 LA 400 (Dash, 1954).

personal belongings. His girl friend placed it in the bag in the hope of getting it fixed or replaced. He forgot about the article and inadvertently brought it into the institution. These events, moreover, indicate it was not his normal practice to carry this item in his personal belongings bag, let alone carry it onto State property. The Grievant, moreover, never removed the BB gun from his bag during the course of the shift. This circumstance evidences he never intended to use or distribute this "contraband item." He initially found out about his oversight when a co-worker confronted him at home after the conclusion of the shift. The Grievant then contacted the Duty Officer to determine what had transpired during his shift.

The operational status of the BB gun also serves as an important mitigating factor when one considers the Grievant's intent. The gun was definitely non-operational and had to be fixed by an expert. As such, the BB gun's status as a full blown "weapon" is also partially mitigated; even though one could argue that it could serve as a "reasonable facsimile."

One argument proposed by the Employer seems a bit confused and partially unsupported. This argument concerns whether the Grievant left his office door and Group Attucks' door unlocked, which allowed Jason B. to gain illegal access. The Employer's reliance on this argument seems a bit confused. Several discipline related documents refer to this negligent fact in partial support of the removal. The argument, itself, was raised during the course of the hearing. And yet, it was withdrawn during the Employer's closing argument. If this argument was, indeed,



considered in support of the removal then its withdrawal at the hearing appears to be highly unusual.

The argument dealing with the unlocked doors was not unequivocally supported. Obviously, Jason B. gained unlawful access. Whether it was the sole consequence of the Grievant's negligent act is somewhat unclear. A more thorough investigation on the Employer's part could have clarified the situation and strengthened the removal decision. The doors in question were never checked to see if there was any forced entry. A likely occurrence when one recognizes the offense record of Jason B. (Employer Exhibit 1). Testimony also suggests the staff is issued duplicate keys to doors and offices for relief purposes. The Employer, however, never queried any of the staff to determine whether they accessed the Grievant's office on or about the time of the incident. Within this context, it becomes quite difficult to conclude, beyond a shadow of a doubt, that the Grievant's actions led to the illegal access.

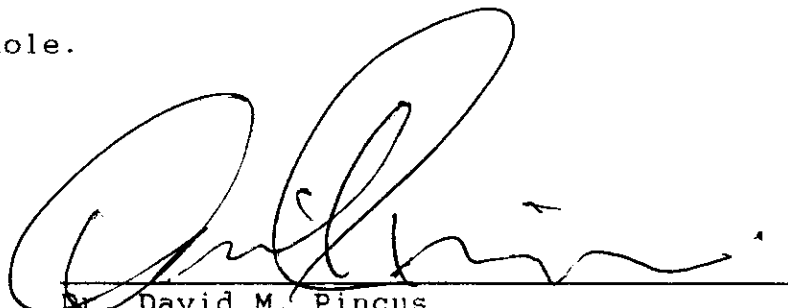
This Arbitrator does not condone the Grievant's actions, but I do not believe they were intentional. Also, the Grievant has been a model employee without any prior discipline record. These various mitigating factors must be balanced against the potential hazards posed by the Grievant's forgetfulness. In this instance, the mitigating factors outweigh the factors which support discharge for "just cause." In arriving at this conclusion, this Arbitrator is not minimizing the offense committed by the Grievant. The Grievant, and others, must understand that a unique set of circumstances led to the Grievant's

reinstatement. Without these special considerations, the Arbitrator would have upheld the removal decision.

AWARD

The grievance is denied in part and granted in part. Removal is changed to a thirty (30) day suspension after which the Grievant is to be fully reinstated and made whole.

October 24, 1991



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Dr. David M. Pincus  
Arbitrator